

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LOL FINANCE COMPANY,)	CASE NO. 4:09-CV-3224
)	
Plaintiff,)	
)	
vs.)	MOTION OR SUGGESTION TO
)	DISMISS PURPORTED CROSS-CLAIM
)	FOR LACK OF SUBJECT MATTER
)	JURISDICTION OR IN THE
PAUL JOHNSON & SONS CATTLE CO., INC., FIRST NATIONAL BANK OF OMAHA, ROBERT P. JOHNSON and KERI J. MALONEY, JOHN DOE and ABC COMPANY,)	ALTERNATIVE FOR LEAVE TO FILE
)	ANSWER
)	
Defendants.)	
)	
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PAUL JOHNSON & SONS CATTLE CO., INC.,)	
)	
Third-Party Plaintiff,)	
)	
vs.)	
)	
MAVERICK FEEDS, INC., SHON SAWYER and JULIE SAWYER,)	
)	
Third-Party Defendants.)	

The Defendant, First National Bank of Omaha (“FNBO”), moves or suggests to dismiss the purported cross-claim filed by Third-Party Defendants and in the alternative requests leave to file the attached Answer to the purported cross-claim asserted against it by the Third-Party Defendants. In support of its Motion, First National Bank of Omaha states:

1. Federal Rule of Civil Procedure 14(a)(2) specifically addresses the issue of what type of claims can be asserted by a third-party defendant, and it provides in pertinent part that a

third-party defendant can assert a cross-claim against “another third-party defendant.” FNBO is not a third-party defendant. The language of the Federal Rules of Civil Procedure, the structure of those Rules, and the history of amendments to those Rules demonstrate that the purported cross-claim filed here against FNBO by the third-party defendants is inappropriate and void ab initio. Therefore, the Court does not have subject matter jurisdiction over the purported claims as a matter of law. Accordingly, FNBO respectfully moves or suggests that the Court should dismiss the purported cross-claim pursuant to Fed. R. Civ. P. 12(h)(3) to the extent it purports to assert claims against FNBO.

2. Based on a review of the Court docket by recently hired counsel of record for FNBO, it does not appear that an Answer or other responsive pleading has been filed on behalf of FNBO to the purported cross-claim (Doc. No. 40) filed by the Third-Party Defendants on January 15, 2010.

3. In the event the Court denies FNBO’s Motion or Suggestion to Dismiss, FNBO respectfully submits that it is appropriate to grant FNBO leave to file the proposed answer to the purported cross-claim. The claims for relief asserted in the purported cross-claim, i.e., alleged conversion of and conspiracy to convert cattle proceeds, are identical to those asserted in Plaintiff’s Amended Complaint in this action (Doc. No. 19). FNBO has filed an Answer to Amended Complaint (see Docket No. 37) and, other than the defense of lack of subject matter jurisdiction over the purported cross-claim against FNBO, FNBO does not seek to add any affirmative defenses to those asserted in its Answer to the Amended Complaint.

4. No party will be unfairly prejudiced by having FNBO file the proposed Answer to the purported cross-claim. To date, all of the parties to the purported cross-claim have been proceeding as if no answer by FNBO to the purported cross-claim was required and/or that

FNBO's Answer to the Amended Complaint also applied to the purported cross-claim. As noted above, FNBO is not seeking to interject any new issues in this action, with the exception of the defense of lack of subject matter jurisdiction which, under Fed. R. Civ. P. 12(h)(3), is always an issue and cannot be waived by the parties. Furthermore, FNBO is not asking for a postponement of the pretrial conference or the trial date in this action.

WHEREFORE, Defendant, First National Bank of Omaha, moves or suggests for dismissal of the purported cross-claim filed by the Third-Party Defendants pursuant to Fed. R. Civ. P. 12(h)(3). In the alternative, FNBO respectfully requests that it be granted leave to file the attached Answer to the purported cross-claim filed by the third-party defendants.

Dated this 7th day of September, 2010.

First National Bank of Omaha, Defendant,

By: /s/William F. Hargens
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CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2010, I electronically filed the foregoing document with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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